

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

GTE MOBILNET OF CALIFORNIA  
LIMITED PARTNERSHIP,

Plaintiff,

v.

CITY OF BERKELEY, et al.,

Defendants.

Case No. [20-cv-05460-DMR](#)

**ORDER DENYING MOTION FOR  
LEAVE TO FILE A MOTION FOR  
RECONSIDERATION**

Re: Dkt. No. 50

Plaintiff GTE Mobilnet of California (“Verizon”) filed this action for declaratory judgment under the Telecommunications Act of 1996 (“TCA”), 47 U.S.C. § 332(c)(7) against Defendant City of Berkeley (“Berkeley”), alleging that Berkeley unlawfully denied Verizon’s application to construct a personal wireless service facility in Berkeley, California. Intervenor-Defendants Berryman Reservoir Neighbors (“BRN”) moved pursuant to Federal Rules of Civil Procedure to dismiss Verizon’s First Amended and Supplemental Complaint (“FASC”), which the court denied on September 28, 2021. [Docket No. 47.] BRN now moves pursuant to Civil Local Rule 7-9 for leave to file a motion for reconsideration of portions of the order denying its motion to dismiss. [Docket Nos. 50, 50-1 (Burt Decl. Oct. 12, 2021).] This matter is suitable for resolution without a hearing. Civ. L.R. 7-1(b). For the following reasons, the motion is denied.

**I. BACKGROUND**

The facts of this case were set forth in detail in the court’s September 28, 2021 order denying BRN’s motion to dismiss. *GTE Mobilnet of California Ltd. P’ship v. City of Berkeley* (“*GTE II*”), No. 20-CV-05460-DMR, 2021 WL 4442650 (N.D. Cal. Sept. 28, 2021). In relevant part, Verizon alleges that it filed an application with Berkeley for a use permit to build, operate, and maintain an unoccupied personal wireless service facility (“the project”). East Bay Municipal

Utility District (“EBMUD”) owns the proposed project site in Berkeley. *Id.* at \*1. After reviewing Verizon’s application, Berkeley’s planning staff recommended that Berkeley’s Zoning Adjustment Board (“ZAB”) approve the application. Members of the public voiced opposition to the project at a June 2019 hearing and the ZAB voted unanimously to deny the application. Verizon appealed the denial to the Berkeley City Council and submitted additional supporting evidence. The City Council held a hearing on the appeal on July 7, 2020 at which project opponents again raised objections and the City Council voted to deny the application. *Id.*

Verizon filed the original complaint on August 6, 2020, alleging that Berkeley’s denial of the application was 1) unlawful because it was not in writing in violation of 47 U.S.C. § 332(c)(7)(B)(iii); 2) not based on substantial evidence in violation of 47 U.S.C. § 332(c)(7)(B)(iii); and 3) unlawful because it had the effect of prohibiting Verizon from providing personal wireless services in violation of 47 U.S.C. § 332(c)(7)(B)(i)(II). Berkeley issued a written denial of Verizon’s application after it filed the original complaint. *GTE II*, 2021 WL 4442650, at \*2.

BRN is a group of 10 individuals who live near the proposed cell tower and oppose the project. *Id.* In October 2020, the court granted BRN leave to intervene pursuant to Federal Rule of Civil Procedure 24(a) and ordered it to file an answer. Instead of filing an answer, BRN moved pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss the complaint. Verizon then filed a motion to amend and supplement the complaint to add a claim that Berkeley failed to act on its application within a reasonable period of time in violation of 47 U.S.C. § 332(c)(7)(B)(ii). *Id.* The court granted Verizon’s motion to amend and supplement the complaint and denied BRN’s motion to dismiss the complaint as moot. *GTE Mobilnet of California Ltd. P’ship v. City of Berkeley* (“*GTE I*”), No. 20-CV-05460-DMR, 2021 WL 308605, at \*6, 8 (N.D. Cal. Jan. 29, 2021).

Verizon subsequently filed the FASC. BRN again moved to dismiss the FASC, making three arguments: 1) the court lacks subject matter jurisdiction because the FASC was not filed during the 30-day window set forth in the TCA and thus is not ripe, and relatedly, the TCA’s 30-day commencement of suit provision is jurisdictional and not subject to the relation back doctrine

1 set forth in Rule 15(c); 2) the court lacks subject matter jurisdiction because Verizon lacks  
2 standing to bring this action; and 3) the FASC is untimely. BRN also moved to dismiss the  
3 FASC's requests for "costs and disbursements" incurred in the action pursuant to 28 U.S.C. §  
4 1920. [Docket No. 40 (BRN's Mot. to Dismiss).]

5 The court denied BRN's motion in its entirety on September 28, 2021. *GTE II*, 2021 WL  
6 4442650. Only its ruling on standing is relevant here. BRN's standing argument rested on  
7 "language in a November 8, 2018 'Telecommunications Lease' between EBMUD and Verizon, as  
8 well as purported statements by 'the Director of EBMUD.'" *Id.* at \*6. BRN submitted the  
9 "Telecommunications Lease" as an exhibit to its motion. [See Docket No. 40-3.] As to the  
10 statements by EBMUD's director, BRN cited a document entitled, "Partial transcript of hearing  
11 before Berkeley City Council, July 7, 2020, statement of East Bay Municipal Utilities District  
12 Director Andy Katz." [See Docket No. 40-1.] It is unclear who prepared the purported transcript  
13 as it is unsigned and not certified. BRN also submitted this document as an exhibit.

14 In denying the motion, the court noted that none of BRN's exhibits were authenticated  
15 pursuant to Civil Local Rule 7-5(a). *GTE II*, 2021 WL 4442650, at \*3 n.1. That rule provides:

16 Factual contentions made in support of or in opposition to any motion  
17 must be supported by an affidavit or declaration and by appropriate  
18 references to the record. Extracts from depositions, interrogatory  
19 answers, requests for admission and *other evidentiary matters must*  
20 *be appropriately authenticated by an affidavit or declaration.*

21 N.D. Cal. Civ. L.R. 7-5(a) (emphasis added). Given counsel's failure to authenticate the  
22 documents, the court held that it could not consider them in ruling on the motion. It also ordered  
23 BRN's counsel "to familiarize themselves with the Local Rules regarding motion practice." *GTE*  
24 *II*, 2021 WL 4442650, at \*3 n.1.

25 The court went on to reject BRN's standing argument because it raised factual issues that  
26 could not be decided at the pleadings stage and also because BRN had not adequately explained its  
27 position:

28 Even if BRN properly had submitted the materials for consideration  
under Rule 12(b)(1), the parties' arguments raise factual issues that  
are not conducive to determination on a pleadings motion. In any  
event, BRN does not explain how a provision in the lease purportedly

giving EBMUD final authority to reject the project defeats Verizon's Article III standing to challenge Berkeley's decision on its application under the TCA.

*Id.* at \*6.

BRN now moves for leave to file a motion for reconsideration of the court's order on its standing argument.

## **II. LEGAL STANDARD**

Pursuant to Civil Local Rule 7-9, a party may seek leave to file a motion for reconsideration of an interlocutory order at any time before judgment. Civ. L.R. 7-9(a). A motion for reconsideration may be made on one of three grounds: (1) a material difference in fact or law exists from that which was presented to the court, which, in the exercise of reasonable diligence, the party applying for reconsideration did not know at the time of the order for which reconsideration is sought; (2) the emergence of new material facts or a change of law; or (3) a manifest failure by the court to consider material facts or dispositive legal arguments presented before such order. Civ. L.R. 7-9(b)(1)-(3). Reconsideration of a prior ruling is an "extraordinary remedy, to be used sparingly." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). The moving party may not reargue any written or oral argument previously asserted to the court. Civ. L.R. 7-9(c).

## **III. DISCUSSION**

BRN moves for leave to file a motion for reconsideration of the court's refusal to consider the three exhibits attached to its motion as well as its rejection of BRN's standing argument. It argues that reconsideration is warranted based on the court's "manifest failure" to "consider material facts or dispositive legal arguments which were presented to the Court." Mot. 2.

First, BRN argues that the court's refusal to consider the three unauthenticated exhibits did not take into account that BRN had premised its motion on "the complaint and other filed records in this case," and that BRN's counsel had previously authenticated the three exhibits in a filing made earlier in the case. Mot. 2-3. BRN also notes that Verizon did not object to the exhibits and quoted from the lease agreement in its opposition, thereby waiving any objection. *Id.* at 3-5. BRN does not dispute that it failed to comply with Local Rule 7-5(a), but argues that the court's refusal

1 to consider the exhibits “violated the letter and spirit” of Federal Rules of Civil Procedure 1 and  
2 61, which provide in relevant part that the rules of civil procedure “shall be construed to secure the  
3 just, speedy, and inexpensive determination of every action”<sup>1</sup> and that “[a]t every stage of the  
4 proceeding, the court must disregard all errors and defects that do not affect any party’s substantial  
5 rights.” *Id.* at 5-6.

6 BRN’s argument inappropriately shifts counsel’s responsibilities to the court. The court is  
7 not obligated to comb through the docket to see if it might find the materials that BRN’s counsel  
8 was required to file under Local Rule 7-5 and Federal Rule of Evidence 901. It is counsel’s job to  
9 follow basic procedural rules which are designed to promote fairness and efficiency.  
10 Unfortunately, this is not the first time BRN’s counsel failed to comply with the Local Rules. In  
11 its order granting Verizon’s motion to amend and supplement the complaint, the court noted that  
12 BRN “attempt[ed] to incorporate by reference” arguments set forth in a different brief, which the  
13 court held was “an improper attempt to get around the page limits set forth in Civil Local Rule 7-  
14 3, which provides that any opposition to a motion ‘may not exceed 25 pages of text.’” *GTE I*,  
15 2021 WL 308605, at \*4 n.1.

16 Next, BRN contends that the court “failed to consider or rule upon BRN’s legal argument .  
17 . . . that the lease was subject to judicial notice because Verizon had quoted from it in the FAC.”  
18 Mot. 7. This too is unpersuasive. BRN’s entire judicial notice “argument” comprised one  
19 sentence in a footnote: “BRN requests that the Court take judicial notice of this lease.” This  
20 sentence was followed by a single citation which, as discussed below, misstates Ninth Circuit law.  
21 BRN’s Mot. to Dismiss 22 n.11. BRN did not cite Federal Rule of Evidence 201, which governs  
22 judicial notice and provides that a court may take judicial notice of “an adjudicative fact if it is

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23  
24 <sup>1</sup> Rule 1 states:

25 These rules govern the procedure in all civil actions and proceedings  
26 in the United States district courts, except as stated in Rule 81. They  
27 should be construed, administered, and employed by the court and the  
28 parties to secure the just, speedy, and inexpensive determination of  
every action and proceeding.

Fed. R. Civ. P. 1.

‘not subject to reasonable dispute,’” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) (quoting Fed. R. Evid. 201(b)), or otherwise explain how the lease satisfied the requirements of that rule. The court cannot analyze an argument that counsel fails to develop.

In any event, BRN is wrong on the merits. The sole authority BRN cited in support of judicial notice of the lease was *In re CNET Networks, Inc.*, 483 F. Supp. 2d 947, 953 (N.D. Cal. 2007), for its statement that “[o]n considering a motion to dismiss, judicial notice of the full text of documents referenced in a complaint is proper under the doctrine of incorporation by reference.” BRN’s Mot. to Dismiss 22 n.11. This is an inaccurate statement of the law.<sup>2</sup> Under Ninth Circuit authority, incorporation by reference is appropriate “if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff’s claim,” but “the mere mention of the existence of a document is insufficient to incorporate the contents of a document.” *Khoja*, 899 F.3d at 1002 (quotations and citations omitted). The FASC does not refer extensively to the lease, nor does the lease form the basis of Verizon’s claims. Therefore, the court could not consider the lease under the incorporation by reference doctrine.

BRN next argues that the court should reconsider the portion of its order rejecting the standing argument on the ground that “the parties’ arguments raise factual issues that are not conducive to determination on a pleadings motion.” Mot. 7 (quoting *GTE II*, 2021 WL 4442650, at \*6). Here, BRN contends that the court failed to consider the “material fact” that Verizon stated in its opposition that “[t]he facts relevant to [the motion to dismiss the FASC] are few and undisputed.” Mot. 7 (quoting Docket No. 41 at 2). This argument also lacks merit. BRN takes Verizon’s words out of context; the quote from Verizon’s papers merely introduced a brief statement of facts about Berkeley’s denial of Verizon’s application. BRN’s position is also disingenuous. It ignores the portion of its own motion that acknowledges Verizon and BRN’s dispute about the significance of purported statements by an EBMUD official that BRN contends

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<sup>2</sup> BRN has also conflated judicial notice under Federal Rule of Evidence 201 and the incorporation by reference doctrine, which are distinct concepts. See *Khoja*, 899 F.3d at 998 (explaining that the incorporation by reference doctrine and Rule 201 judicial notice both “permit district courts to consider materials outside a complaint [when ruling on a Rule 12(b)(6) motion], but each does so for different reasons and in different ways.”).

support its standing argument, as well as the official's role and apparent authority to speak on behalf of EBMUD. Mot. to Dismiss 24 n.12.

Finally, BRN argues that the court should reconsider its ruling that "BRN does not explain how a provision in the lease purportedly giving EBMUD final authority to reject the project defeats Verizon's Article III standing to challenge Berkeley's decision on its application under the TCA." Mot. 7-8 (quoting *GTE II*, 2021 WL 4442650, at \*6). BRN argues that this fails to consider "the dispositive legal arguments" that it presented in its brief. To the contrary, the court considered BRN's argument on this point and concluded that it was opaque and unpersuasive.

In sum, BRN has failed to show a "manifest failure by the court to consider material facts or dispositive legal arguments presented before" the September 28, 2021 order denying its motion to dismiss the FASC. Accordingly, its motion for leave to file a motion for reconsideration is denied.

#### IV. CONCLUSION

For the foregoing reasons, BRN's motion for leave to file a motion for reconsideration is denied.

**IT IS SO ORDERED.**

Dated: February 24, 2022

